IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE:	.	Case No. 22-19361-MBK
	.	(Jointly Administered)
BLOCKFI INC., *et al.*,	.	
	.	
Debtors.	.	
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. . . . .	.	
	.	
BLOCKFI INC., *et al.*,	.	Adversary No. 23-01071-MBK
	.	
Plaintiffs,	.	
	.	
v.	.	
	.	
TREY GREENE AND	.	
ANTONIE ELAS,	.	
	.	
Defendants.	.	Thursday, August 17, 2023
. . . . .		11:05 a.m.

TRANSCRIPT OF MOTIONS HEARING IN LEAD CASE
AND STATUS CONFERENCE IN ADVERSARY CASE
BEFORE THE HONORABLE MICHAEL B. KAPLAN
UNITED STATES BANKRUPTCY COURT JUDGE

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THE COURT: Okay. Good morning everyone. This is Judge Kaplan. Thank you all for appearing remotely. As already some of you have started, if you want to be heard, please raise your hand and I'm happy to hear from you all. And we have two matters to review.

Bear with me just one moment. Here we go.

Two matters on with respect to BlockFi. The scheduling conference on the motion brought on behalf of the potential or putative plaintiff Cameron Wyatt, lead counsel, as well as the objection to the claim of Mr. Gerro or it's Gerro. I'm going to ask how I pronounce it properly when we get there.

Mr. Kanowitz, did you want to be heard on the order to address these matters?

MR. KANOWITZ: Yes, Your Honor. That's exactly why I raised my hand. Thank you, and thank you for accommodating us by Zoom today.

I suggest we do the scheduling conference first. It should take very few time commitments from anybody here, and those who don't need to participate in the Gerro claim objection could leave if they so desire. If Your Honor is permitting us to do that, that would be great.

THE COURT: All right. I tend to agree. That was where I was inclined. It will allow us to have more fuller opportunity for the arguments that I anticipate in the other matter.

So I see Mr. Etkin. Let me have appearances with respect to the Cameron Wyatt matter.

MR. KANOWITZ: Appearing for the debtor, Richard Kanowitz.

MR. ETKIN: Good morning, Your Honor. Michael Etkin, Lowenstein Sandler for Mr. Wyatt.

THE COURT: Wyatt, yeah.

MR. ETKIN: On the phone as well is my colleague Mr. Papandrea, as well as Brian Collandra, a partner at the Pomerantz law firm who is representing Mr. Wyatt in connection with the lead plaintiff motion that's pending in the district courts.

THE COURT: All right.

MR. GOLD: Dan Gold from Sherman and Sterling. We represent the individual defendants in the securities litigation.

THE COURT: All right. Good morning, still, Mr. Gold.

Anyone else?

(No audible response)

THE COURT: Let me turn to plaintiffs' counsel, Mr. Etkin or your co-counsel who wishes to address the matter.

MR. ETKIN: Well, Your Honor, assuming that this is just for scheduling purposes, obviously, we were looking through our motion to shorten time to get this before the Court

as soon as possible given the timing involved. And that remains our position. So we would ask the Court to schedule this as soon as reasonably possible.

We're getting into a time of the year where scheduling and people's availability becomes a little difficult, and we have our eye on that September 11th objection deadline with respect to confirmation and the confirmation hearing on September 26th.

One thing that is clearly true that was pointed out in the debtors' opposition to the motion to shorten time is we really don't know how quickly the district courts are going to act if given the opportunity to act on the pending motions for appointment of lead plaintiff and lead counsel. But what we do know is that without the relief we're requesting, they're not going to act at all.

So we're looking at these deadlines staring at us that are within the next few weeks. So from a scheduling perspective, we would ask that the Court put this on as soon as possible.

THE COURT: All right. I understand the intent was to have the matter heard on shortened time. It was just in the Court's view too quick to allow reasonable opportunity to respond. It's not my intent to go forward with a discussion on the merits, although it's always difficult when you're talking about scheduling and the need to have something heard.

Let me first hear from -- let me next hear from Mr. Kanowitz.

MR. KANOWITZ: Yes, Your Honor.

And we're pleased to try to accommodate the movant. Clearly, if they had just filed a regular motion, we could have it heard on September 6th. That is the court hearing date for us, I believe. If Your Honor wanted to moved it up further, we do have an August 30th date.

We need at least a week for debtor to respond fulsomely. We're going to demonstrate why the motion and the movant have no merit, but we'll leave that for another day.

I would point out in scheduling, you know, Your Honor's order and stipulation that we had with the class action plaintiffs who appeared as defendants was done in May -- sorry, in April. And all the class action motions that were permitted to be filed were filed on May 1st. So we had three and a half months or three months waiting anticipating relying on things and while we're committed to moving fast or as Your Honor directs, if it's too fast, we are not going to be able to brief everything. That's very important for this Court to understand before you rule on the motion.

So I could do it August 30th. I would ask that if we do it August 30th that we do it by Zoom. It is just oral argument on a motion. There might be other matters on for that day I believe that could also be handled by Zoom and, if not,

September 6th could appear in person.

THE COURT: All right. I'm inclined to schedule it on the 30th. Does anybody else want to be heard?

MR. ETKIN: Your Honor, if I might?

THE COURT: Yes.

MR. ETKIN: Clearly, we would like it to be even a little sooner than that because we're running into Labor Day weekend from the 30th. And if the Court were inclined to grant the motion, we would then have to reach out to the district court and where we're really cutting it close. But obviously, it's Your Honor's call.

I would also point out that the landscape of this case was a little different back on May 1 than it is today. There was no consensual plan. I think as I'm trying to play some catch-up football with respect to this case, I think the Committee and the debtor were at serious odds with one another way back when. So things have changed; the landscape has changed somewhat since the lead plaintiff motions were filed.

But, again, if the Court is looking at August 30th, we'll accommodate. The sooner the better as far as we're concerned.

THE COURT: All right.

MR. ETKIN: It's not a complicated motion, Your Honor.

THE COURT: No, it's not.

And I'm glad to address the merits of it. I mean certainly just looking at the pleadings that will be filed, Mr. Wyatt seems to have at least four counsel who signed off on the pleading. So going forward, even though it's a short time frame before the confirmation hearing and the objections, I'm not that concerned that Mr. Wyatt will be prejudiced, but I certainly want to hear from counsel.

I think the 30th is a fair -- it accommodates the Court's schedule significantly and also it gives the opportunity to get in rather quickly. So with opposition due, Mr. Kanowitz, let's take a look at the calendar.

MR. KANOWITZ: We could do it a week before, Your Honor, and provide a reply, if any, if you permit, get done so that we could see what they're going to say in response.

THE COURT: That's fine. So 30th, opposition due the close of business on the 23rd with replies due close of business on the 28th, that Monday.

MR. KANOWITZ: Thank you, Your Honor.

THE COURT: All right. Thank you, Counsel.

MR. ETKIN: Thank you, Your Honor.

THE COURT: I appreciate your accommodation.

MR. KANOWITZ: Your Honor, the next matter, the Gerro matter, I would cede the virtual podium to my colleague Jordan Chavez who will be handling the primary oral argument of this

case.

THE COURT: All right. Thank you, Mr. Kanowitz.

MR. ETKIN: Your Honor, I'm sorry to interrupt.

THE COURT: Yeah.

MR. ETKIN: But may we be excused?

THE COURT: You are by all means excused. Have a good weekend.

MR. ETKIN: As much as I'd love to stay.

THE COURT: All right.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

MR. ETKIN: Thank you, Your Honor.

THE COURT: You're welcome.

(Status Conference in adversary case concluded at 11:15 a.m.)

THE COURT: All right. Let me have appearances in the -- Mr. Gerro, you're going to have to -- is it Gerro?

MR. GERRO: Your Honor, I'd say that it's Gerro as in "thorough."

THE COURT: All right. Mr. Gerro, good morning.

And let me have other appearances.

MS. CHAVEZ: Good morning, Your Honor.

Jordan Chavez with Haynes and Boone on behalf of the debtors.

THE COURT: All right.

Anyone else entering an appearance?

MR. RENZI: Good morning, Your Honor.

Mark Renzi, CRO for the debtors.

THE COURT: Good morning, Mr. Renzi.

Okay. So we've had briefing, extensive briefing which I've read through. I welcome oral argument to supplement the briefing. The burden here is a shifting burden. We all know that once the proof of claim is allowed, it's prima facie valid until there's been opposition raised. Then ultimately, Mr. Gerro, the burden rests with you.

Let me hear from the debtors. It's the debtors' objection initially, so we'll start with the debtor and then I'll give, Mr. Gerro, you a full opportunity.

MS. CHAVEZ: Thank you, Your Honor.

Again, Jordan Chavez on behalf of the debtors.

I'm addressing the debtors' fourth omnibus objection filed to the claims filed by Mr. Gerro at Docket Number 1069 which were followed by his response and cross-motion at Docket Number 1192 and the debtors' reply at Docket 1341.

As Your Honor has noted, the debtors view it as appropriate to take up the objection first as the first filed pleading and because it obviates the need to address the cross-motion. I know Your Honor has read all of the papers and is fully aware of the litigious history between BlockFi and Mr. Gerro. His claims are rather convoluted, but as we've outlined in our papers, the path to disallowance for these claims is straightforward.

There's no triable issues of fact here. The only dispute is whether, despite the clear terms of the loan agreement, Mr. Gerro is entitled to a claim for 426 Bitcoin against BlockFi. And the answer to that question is a resounding no as a matter of law.

These matters can be decided on the papers, and I'd like to move for admission of the debtors' exhibits and then just take a few moments to summarize why these claims should be disallowed.

Your Honor, I'd like to move for admission of the Debtors' Exhibit A which was attached to the claim objection and is the Renzi certification, as well as Debtors' Exhibits A through E that were attached to the reply which is the loan agreement, the email communications between the parties, the Washburn declaration, the Owen declaration, and the Gerro-3 notice of ruling.

THE COURT: All right. Mr. Gerro, I haven't seen any issues taken with exhibits on either side that have been presented, so I'm inclined to admit them all. Any objection on your end?

MR. GERRO: Your Honor, I think as long as it's mutual, I will not make any evidentiary objections, if that's okay with the other side, as well. Yeah.

THE COURT: All right. Well, I don't see why it shouldn't be mutual, the exhibits. The Court's had the

opportunity to review it as a practical matter, and they inform the Court on the issues. So we'll admit the exhibits --

MS. CHAVEZ: Thank you, Your Honor. For the record --

THE COURT: Both the movant and the respondent.

(Respondents' Exhibit A admitted into evidence)

(Respondents' Exhibits A through E admitted into evidence)

(Movants' Exhibits 1 through 31 admitted into evidence)

THE COURT: Was there someone else who wanted to be heard? I'm sorry, I interrupted.

MS. CHAVEZ: Oh, no. I interrupted. Sorry, Your Honor. Thank you.

And for the record, we do not object to Mr. Gerro's exhibits either.

So for the reasons that this claim should be disallowed, first and foremost, Mr. Gerro, is not a creditor of BlockFi. Mr. Gerro is an attorney with a pre-petition loan with BlockFi Lending in which he borrowed $2.27 million and pledged approximately 440 Bitcoin as collateral.

The loan agreement contains a clean loan-to-value ratio requirement of 70 percent. That ratio rose above 70 percent, BlockFi issued a margin call as it's entitled to do under the terms of the agreement, and Mr. Gerro failed to meet that margin call. Then the ratio rose above 80 percent, and

BlockFi immediately liquidated the collateral which the loan agreement authorized it to do. It liquidated 399 Bitcoin to bring the loan back into compliance.

The emails between the two parties which Your Honor just admitted really say it all. They indicate that Gerro knew about this requirement, he understood the terms of the agreement, he thanks BlockFi for keeping him updated about the liquidations, he inquired about some options to potentially reverse the liquidation but nothing was ever agreed to between the parties.

He instructs BlockFi to liquidate any additional necessary collateral to pay off the remainder of his loan and then return the excess to him which BlockFi promptly did in March of 2020. Gerro then withdrew the remainder of the Bitcoin which was approximately 15 Bitcoin from the platform which is why as of the petition date, he was not a creditor of BlockFi. Then 30 days later, once the market swung in his favor, he attempted to try and bind BlockFi in the emails to some agreement that it never made to reverse or reinstate the loan.

BlockFi acted fully within its rights to liquidate the collateral. There was never a loan modification or other writings signed by the parties which is what the loan agreement requires to effectuate any type of modification, reversal, or reinstatement. This is why Mr. Gerro conjured up the various

arguments he did in his pre-petition state court litigation and then reasserted those in his proofs of claim.

Your Honor, these are red herrings to attempt to divert first the state court and now this Court from the reality that Gerro has no claim against BlockFi. And the debtors would respectfully request that Your Honor disallow these claims in their entirety.

THE COURT: All right. Is that it at this point on your end?

MS. CHAVEZ: Yes, Your Honor. I'd cede the podium to Mr. Gerro for his position.

THE COURT: Thank you.

Mr. Gerro?

MR. GERRO: Good morning, Your Honor.

THE COURT: Good morning.

MR. GERRO: George Gerro, self-represented creditor, attorney practicing in the state of California. And I practice law with my father over here. We have a little real estate practice just him and I.

Your Honor, I have a presentation prepared, but I want to prioritize your questions. So please feel free at any time to ask questions. And I don't need to read any of the prepared remarks. If you just want to address your questions, we could do that if you'd like.

THE COURT: No. I never hesitate in asking questions. I'd rather hear from you and be able to listen and glean if there's any issues that I've missed. So feel free and the presentation is fine.

MR. GERRO: Sure. Absolutely, Your Honor.

Is it possible if I would share my screen to show the documents?

THE COURT: Let me ask those who know far better than I how to do it.

THE CLERK: Yes. He should be able to.

THE COURT: You should be able to do it now.

MR. GERRO: Oh, great. Thank you.

(Pause)

MR. GERRO: Okay. I was informed by my Zoom software that it would require relaunching the Zoom, so I will -- for convenience of the Court and the parties, I will not relaunch the Zoom. Instead, I would rather proceed perhaps with an oral -- I'll make primarily an oral presentation if that's fine.

THE COURT: That's fine.

MR. GERRO: Okay, very good.

When BlockFi was applying for its California finance lender license, BlockFi was informed multiple times in writing that it cannot under California Financial Code Section 22009 retain possession of Bitcoin securing its loans.

Does Your Honor have the exhibits available and in front?

THE COURT: Yes, I do. You could just --

MR. GERRO: Great. Do you want --

THE COURT: -- cite to the tab number.

MR. GERRO: Sure, tab number. Tab Number 14.

THE COURT: All right.

MR. GERRO: And for everyone's reference, this is the certification of George J. Gerro which attaches the proof of claim as Exhibit A, I believe, or Exhibit 1. And this is Attachment 14 to the proof of claim. This is a copy of BlockFi's finance lender license.

The license states in part that pursuant to the California Financing Law, that BlockFi may engage in the business of finance lender as defined in said law. That is an incorporation by reference of the next page in Tab 14, which is Financial Code Section 22009.

This statute defines the business of a finance lender and, in relevant part, it states, "A finance lender includes any person engaged in the business of making consumer loans or making commercial loans. The business of making commercial loans or commercial loans may include lending money and taking in the name of the lender or in any other name in whole or in part as security for a loan any contract or obligation involving the forfeiture of rights in or to personal property,

the use and possession of which property is retained by other than the mortgagee or lender," et cetera.

That language of exclusion, "use and possession of which property is retained by other than the mortgagee or lender," that language is not mere surplusage. That language, language of exclusion, conditions and limits the general grant of authority which is made with the word "may" which is permissive, but the phrase "other than" is not permissive.

The phrase "other than" construed in the statute as a whole only can arrive at one reasonable construction which is that a lender may either have a security interest in personal property or use and possession -- use or possession, excuse me, of personal property. It cannot have both at the same time. The finance lender cannot have a security interest and use or possession of the property.

Of course, Bitcoin constitutes personal property. I don't think there's any dispute about that. It's certainly not real property, and it certainly is property. Now BlockFi was informed of this prohibition, and I will refer the Court to Tab Number 6, please. And for everyone's reference, each tab refers to an attachment to the proof of claim, so this would be Attachment Number 6.

On the third page of this tab, which has a Bates number of 24, the second sentence that's typewritten in this application, it says, "In accordance with California Financial

Code Section 2209," which is a typo, they meant to say 22009, "BlockFi will take in the name of the lender in part as security for the loan possession of each borrower's assets."

That is an incorrect interpretation of the law because the lender is not allowed to take possession of the borrower's assets. The lender is allowed to take a security interest in personal property, which the lender does not use or possess. Now this could have been an innocent misunderstanding, but after two admonitions from the Department of Business Oversight which is now known as the California Department of Financial Protection and Innovation, the admonitions are present in Tab 7, that's a letter dated March 28th.

At the bottom, the last paragraph on the first page of that tab, "The collateral must remain with the borrower," the response indicated here the Department quotes BlockFi. And the next page on the top of the page, it says, it's Bates stamp 27, "This is not allowed under the California Financing Law," CFL for short. "The collateral must remain with the borrower. Moreover, the applicant cannot hold the borrower's digital assets as collateral. Based upon the business plan and explanation provided, the applicant is conducting or will be conducting activities not authorized by the California Financing Law."

That was the second admonition.

The third admonition was in Tab 8 which is a letter dated April 6th, which once again contains a substantially similar admonition at the bottom of the first page. This handwritten "no" on the left margin, that's the way I received the documents directly from the Department of Business Oversight. Perhaps, the person at the Department indicated that this requirement was not fulfilled.

Tab Number 9 if Your Honor is so inclined because I know I'm moving a little quickly, but I want to get to the most shocking exhibits. This is a letter dated April 10th which once again has a similar admonition that BlockFi cannot possess collateral securing its loans. And here in the last paragraph, the Department sets forth California Section 22009 in its entirety.

Then, on the next paragraph, the Department says, "Your email," referring to BlockFi's email, "dated April 10th, 2018 indicates reference to a different law" -- which was the Uniform Commercial Code as we will see in the next attachment -- "and not the California Financial Code."

"I do understand your confusion. However, we have obtained legal counsel, and the laws of the California Commercial Code do not apply or trump the laws under the California Financial Code. Therefore, the business plan and method of operation are not allowed under the California Financing Law. The collateral must remain with the borrower.

Applicant cannot hold the borrower's digital assets as collateral. Based on the business plan provided, it's not allowed."

Let's in fact see that email dated April 10th and find out what was said. And that is in Attachment 10. Oh, Attachment 10, yes. Attachment 10.

Attachment 10 is actually an email chain. So the first email here -- well, let's actually go sequentially here. Let's go to the third -- I'm sorry, the fourth page. The fourth page or the fifth page under Attachment 10. I will paraphrase.

Essentially, what has happened was that on April 10th, 2018, an attorney for BlockFi working on behalf of Manatt Phelps, a law firm in California, perhaps they are also present on the East Coast, was attempting to explain why he believes that the language that we saw earlier -- which I posit is not mere surplusage because we must give effect to every clause and every word if possible -- that he claims that that language is a vestige, that's a quote.

A vestige of the law, meaning that he's essentially arguing that the legislature should have or intended to repeal the language and that it should be ignored, essentially. There is a reference made to the Uniform Commercial Code's provisions that allow a secured party to secure or to perfect their

security interest in collateral by taking possession of the collateral.

However, that Code section, which is Uniform Commercial Code Section 9-313, under Official Comment 7, that Code section says that it does not create a right to take

possession.

Furthermore, the Uniform Commercial Code has an express reverse preemption provision. And why do I call it a reverse preemption provision? It expressly states that it does not authorize or validate any provision that violates another substantive law. And here, the substantive law is a statutory law.

Now if I could refer this Court to the first page of Exhibit 10, Tab 10. I'm sorry, Attachment 10 I meant to say.

After the letter that we saw from April 10th, BlockFi sends an email on April 11th. And in the introduction, it says, "The phone call we had yesterday was extremely useful." So after the letter or on the same day as the April 10th letter, there was a phone call.

Then in the paragraph entitled "Updated Business Plan" with an underscore underneath it, BlockFi says that now it has revised its business plan and as part of their underwriting, they will prescribe value -- this is the second paragraph under "Updated Business Plan" on Bates stamp Page 35.

And under the "Updated Business Plan" subheading, the second paragraph, it says, "BlockFi Lending will make one year loans" -- I'm going to skip over some language here. "As part of our underwriting, we will prescribe value to commercial and consumer applicants' holdings of cryptocurrencies which they possess." In other words, BlockFi has now updated its application to say that the borrower will possess the digital assets securing the loan.

They were admonished that they cannot retain use and possession. They sent an email, they had a phone call. They updated their business plan in writing. This was the last update of their business plan that I have seen. And although I did not receive these documents from BlockFi because BlockFi would not provide me with these documents. BlockFi has admitted in other pleadings that these are genuine, they are directly from the Department of Business Oversight. And this was the last written update to the application.

I will move now to Attachment 11, Tab 11.

This is a request for interpretative opinion. (Indiscernible). The Commissioner of the (indiscernible) has authority to issue specific rulings in writing, and there's a regulatory section that defines that authority. It's for this Court's reference, you don't need to look into this, it's Title 10 of the California Code of Regulations Section 250.12(a).

And in part, this regulation states that a request for an interpretative opinion shall be made in writing, it shall fully set forth the questions presented and the particular facts and circumstances upon which the opinion is requested. Each interpretative opinion, determination, or specific ruling is applicable only to the transaction identified in the request, therefore, and may not be relied upon in connection with any other transaction.

Moving to the request for interpretative opinion, in this request, Attorney Charles Washburn on behalf of Manatt, Phelps & Phillips, LLP, sets forth the same argument that was set forth in his email that we saw a few moments ago, which essentially states this language does not prevent us from taking possession of collateral. He admits that BlockFi is going to be possessing the collateral or in this interpretative opinion, he says that his client would like to take possession of the collateral.

And the part that I would like the Court to see is on Page Bates stamp -- pardon me one moment. I apologize because I had highlighted the electronic version I was planning on presenting it on the screen for all of us.

Okay, Bates stamp Page 44. This is the second full paragraph. It starts where -- with the words "In a letter." Okay, here the attorney for BlockFi is acknowledging actual receipt of that letter dated April 10th which had the strongest

admonition in the series of letters. And he goes on to acknowledge other admonitions that we did not see in the record. For example, on the second full sentence starting with "Other communications from Department representative to BlockFi have similarly stated that a finance letter may "never hold the assets of California borrowers it makes loan to under the California Finance Lender License."

"Assets collateral may not be held by BlockFi or any other third party."

"The collateral" -- that word is illegible -- "has to remain with the borrower, and the California Finance Lending License does not permit you to take possession of the collateral."

The reason why this is important is because the attorney for BlockFi is acknowledging actual notice of this prohibition, it's an implied prohibition but a prohibition nonetheless, okay. Now was the Department perfectly correct? Well, the statute is our guidepost because what the Department says is not necessarily what this Court must accept. This Court should independently construe the statute.

However, upon the independent construction of the statute, if this Court finds that BlockFi's interpretation of the statute is unreasonable, then under an authority cited in the briefs, Safeco Insurance, that it does not matter what the subjective intent of the party was. And that's very common

under these willful provisions imposing civil liability that an objectively unreasonable construction of a statute means that there was a willful violation of that statute.

Here, of course, we have actual notice of the prohibition. And I think that it's pretty clear that this was addressed by the executives. Something I should have pointed out in the emails was that the founders and chief executive, Zac Prince and Flori Marquez, were copied on the email from Washburn to the Department and that Flori copied -- Flori Marquez sent the email to the Department updating the business plan. So this was something that the executives knew about.

Flori Marquez, which by the way, there is absolutely nothing personal about this case. If you asked my opinion, I think that these were just -- they were just trying to do this business uniformly throughout the states, and they wanted to -- they didn't want to make a whole change to their business model, just for California. But under California law, the legislature in California has said that this business model was not allowed.

Let's flip now to Attachment 13.

THE COURT: Let me just stop you.

MR. GERRO: Yes, please. Go ahead.

THE COURT: I certainly hope we're not intending to go through all 31 of them.

MR. GERRO: Absolutely not, Your Honor. Yes.

THE COURT: So that's my gentle nudge that you go to the heart of the arguments because I have read your papers. I understand all of what you're submitting.

MR. GERRO: Absolutely. And I will -- in fact, according to my notes, I only have two more attachments that I'm going to discuss and then I'm going to focus on the reply. I will try to make --

THE COURT: That's fine.

MR. GERRO: -- it very concise. Thank you, Your Honor.

THE COURT: That's fine. Thank you.

MR. GERRO: Okay. At the end of the request for interpretative opinion that we were just looking at, Washburn says that if the Department reaches a preliminary conclusion that BlockFi cannot retain possession of collateral, that he'd be permitted to withdraw the request for interpretative opinion.

And Attachment 13 shows that according to the Department of Business Oversight, that no interpretative opinion was ever issued and that Washburn did withdraw the request for interpretative opinion.

Now let's jump to the dispute here. Washburn's declaration says that he received a phone call from the Department and they told him, they said we agree with you but

we're not going to issue anything in writing, we're just going to issue your license. Okay.

(Indiscernible) same law does provide a safeharbor for a lender that relies upon a general rule, regulation, or specific ruling of the Commissioner, and that's Financial Code -- California Financial Code Section 22754. 22754.

And it states in relevant part that, "Any act done or omitted in good faith in conformity with any written general rule, regulation, or specific ruling of the Commissioner" shall not subject to the finance lender to liability. That has a three-element test embedded in it.

Number one is that there must be a general rule, regulation, or specific ruling of the Commissioner which is the product of a quasi-legislative or quasi-judicial process. In this case, it's undisputed that there was no quasi-legislative or quasi-judicial outcome and no final product of that process and, furthermore, that there was no writing that authorized the use and possession of collateral.

Number two, BlockFi must act in conformity with the ruling. And as we saw earlier, the license incorporates Section 22009 meaning that BlockFi did not act in conformity with its license.

And number three, the acts must be done in good faith. And I would posit that an act that is based upon an

unreasonable construction of the statute is not an act in good faith but as a matter of law.

Let's discuss the declaration of Jan Lynn Owen who impressively was actually the Commissioner at the time that BlockFi applied for its license. This declaration was made by her in 2021 while she was working for the same law firm that represented BlockFi in its application to the Department of Business Oversight, Manatt, Phelps & Phillips, LLP. She works for the same law firm that Washburn works for.

And she did not make the declaration in any official capacity. She admitted that she had no personal knowledge of the BlockFi application. And she says as a matter of her personal opinion, she says that this is common in commerce and that Mr. Gerro is incorrect in his reading of the law.

Okay. Now I will tell you that according to the hornbook, which I've referenced and of course I always have citations but I'm going to omit the citation here, the hornbook says that actually commercial transactions where the lender takes actual possession of the collateral is actually a small minority of all commercial transactions.

Most of the time when we think about a margin loan, it's when a bank financial institution or securities dealer is using -- and, by the way, those are all independent authorizations and BlockFi does not qualify as any of those authorizations. It's undisputed that my loan was made solely

pursuant to the California Financing Law. And those provisions, those are highly regulated transactions. They are done with less volatile instruments. There are lots of oversight measures, lots of regulators, lots of statutory provisions that protect in that situation. The California Financing Law does not have any provisions dealing with a lender's possession of collateral.

The pawnbroker law does. And the pawnbroker law states that under California law, this is actually California Financial Code Section 21000, defines a pawnbroker as a lender receiving goods to secure a loan. And BlockFi argued in its reply that the test for a good is whether something is moveable, and I agree. I just believe that Bitcoin is moveable.

The reason why I brought up the pawnbroker law is because the statutory structure is also important to keep in mind when construing the independent statutes. The California pawnbroker law has provisions that protect the borrowers. It has a statutory right of redemption for the entire loan term. The loan can, therefore, not be accelerated. The collateral cannot be sold before the expiration of the loan term. The California Financing Law has none of those safeguards. It was not intended to govern or protect a borrower in the situation where they are giving their possession to the collateral.

Now does the Court have any questions or can I -- I

will -- at this time or I could breeze through the rest of the presentation if you would like?

THE COURT: Why don't you breeze through the rest.

MR. GERRO: Yes.

THE COURT: And then if I have questions, I will ask.

MR. GERRO: Thank you. Thank you so much, Your Honor.

The declaration of Jan Lynn Owen does not qualify for the safeharbor under the California Financing Law because it was a writing that was not a general rule, regulation, or specific ruling of the Commissioner, and it was issued after the foreclosures and, therefore, BlockFi could not have conformed in good faith to the writing, meaning that for there to be a writing that is sufficient that BlockFi could confirm with, that it would have to be prospective conformity, not retrospective conformity.

I assume that there's no writing because BlockFi would have produced it if they had a writing. Notably, absent from the record is that the Department of Business Oversight had never issued a writing. Well, I have not seen one. I have not seen any writings that would justify this deviation from the statute.

I'd like to also point out that the reply does not dispute that BlockFi took possession of the Bitcoin. They do not dispute that BlockFi charged an unlawful amount by

retaining the proceeds from the Bitcoin. The proceeds from the Bitcoin which would have been known to the common law as the use of the Bitcoin, the use belongs to the borrower under the Uniform Commercial Code Section 9-207(c).

THE COURT: Well, let me stop you there. Doesn't 9-207 have the exception provided that if you contract otherwise and that section has the exception for consumer goods. So you would have to establish that it's a good and that it's a consumer good.

I saw in your memorandum only one reference to a case that referred to digital assets as a good. You referenced electricity cases which are all over the place for there's a half probably a dozen on each side of the argument as to whether an electricity is a good. But certainly under the Uniform Commercial Code, goods exclude investment property which are securities, certificated or otherwise.

And there are more cases that have argued that cryptocurrency are securities. There are cases that have argued and take the position that they are general intangibles and including payment intangibles. But other than the one case you cited, are there any other cases that suggest that they are a good let alone a consumer good?

MR. GERRO: May I address those questions in order?

THE COURT: Yes.

MR. GERRO: First, Your Honor, you mentioned 9-207

can be contractually waived. That is true. Here there was no contractual waiver. The loan does not allow BlockFi to lease the Bitcoin. It does not allow BlockFi to retain the proceeds from the Bitcoin. It does not allow BlockFi to charge the proceeds from the Bitcoin. It does not disclose that there will be a charge of the proceeds from the Bitcoin which should be disclosed. It must be disclosed under the Truth in Lending Act. And if it cannot be known with certainty, it must be estimated.

Okay. So I would like to make very clear that the rule under Section 9-207 is the operative rule that we are playing with. And regarding Bitcoin's categorization under the Uniform Commercial Code, that is an interesting question. It's potentially relevant to the pawnbroker issue. It does not bear at all under the financing law. The financing law as we saw makes reference to personal property, and we know that Bitcoin is personal property.

Now whether or not Bitcoin is a good for purposes of the pawnbroker law, that's an interesting question, and the reason why is that we know Bitcoin is not a service, we know it's not a security. We know that it's something that could be actually possessed. It can be actually received. And the pawnbroker laws are -- if we say that Bitcoin is not a good, then you see the way that a good is defined is it's defined almost as a chosen possession. It's something that could be

actually possessed.

THE COURT: Well, again --

MR. GERRO: Go ahead.

THE COURT: -- let me stop you, because isn't it more than just being a good. Doesn't California's regulation or statute -- and I'll refer to the Business and Professionals Code, BPC 21627, doesn't it have to be a tangible good? Tangible personal property.

Let me just back up. And when I looked through this, BPC 21626 defines and refers to secondhand dealers. And it refers to those whose business includes buying, selling, trading, taking in pawn, and accepting for sale or consignment tangible personal property. So a secondhand dealer includes all pawnbrokers, but pawnbrokers aren't all secondhand -- pawnbrokers are secondhand dealers but not all secondhand dealers are pawnbrokers.

But for secondhand dealers, it has to be tangible personal property. How is digital currency tangible?

MR. GERRO: I love that question because it shows how learned that Your Honor is. It's really a good question because it's a secondhand dealer is very related to a pawnbroker. It's not -- a secondhand dealer is not necessarily a pawnbroker.

And as pointed out in the memorandum of law --

THE COURT: No, but a pawnbroker is necessarily a

secondhand dealer.

MR. GERRO: I'm not sure sure about that, Your Honor. The pawnbroker is statutorily defined and has a separate statutory definition to a secondhand dealer.

THE COURT: Well, and in fairness to you, I'm reading this from the Secondhand Dealer Pawnbroker Licensing Unit Frequently Asked Questions put out by the Office of the Attorney General for the California Department of Justice. And a pawnbroker is also a secondhand dealer, but a secondhand dealer is not a pawnbroker. So --

MR. GERRO: Okay.

THE COURT: And if you read -- and according to the definition, it includes pawnbrokers. So we go back to is there a need for it to be tangible as a pawnbroker. We moved on beyond the UCC.

MR. GERRO: Sure.

THE COURT: And we moved beyond the financing Law.

MR. GERRO: Sure.

THE COURT: Let's just focus now for the last bit on the pawnbroker element.

MR. GERRO: Yes. And, also, if we can before we conclude, I'd like to also discuss the contract just a little -- the contractual redemption just a little bit.

Your Honor, California Financial Code Section 21000 *et sequitur*, that contains all of the provisions that have to

do with licensing a pawnbroker, defining a pawnbroker, and regulating a pawnbroker. The Business and Professionals Code does regulate secondhand dealers, but it does not set forth the licensing provisions. And I don't believe it's incorporated by reference. I've done extensive research on the statutory construction and legislative history.

Your Honor is correct that goods are sometimes defined as intangible by the legislature, and a good example of that is on the memorandum of law which unfortunately came after all of the attachments, but Your Honor has obviously read it because I think you referenced it earlier during this oral argument, that in Footnote 7, there are citations to California statutes that define a good as being tangible but there are also sections that define goods without reference to tangibility.

And the pawnbroker law defines good -- I'm sorry, it does not define good. It does not say tangible. If the legislature wanted to limit it to tangible, tangible personal property, they could have. As Your Honor just showed with the Business and Professions Code, the legislature is more than capable of defining a good with reference to tangibility. And the legislature does say tangible personal property in many different statutory sections.

I've checked five different dictionaries, and only one of those five dictionaries had a reference to tangibility.

I believe even -- I don't have the definition in front of me, but I even believe that -- the reason why I'm citing these old cases is because the language, the word "goods," this is actually a statutory language that's been carried on since England.

This statute "goods" was imported from England, and that's why I'm citing to laws under the -- I'm citing to the common law which I think we may assume the common law definition of a good is what the legislature intended without further modification.

So I know Your Honor is -- the pawnbroker law is maybe not the strongest argument in Your Honor's opinion, and I respect that and I understand that. But may I talk about the contractual right of redemption? Is that --

THE COURT: Yes.

MR. GERRO: Can we move on or -- okay.

THE COURT: Let's move on to that. Then I'd like to hear from debtors' counsel.

MR. GERRO: Absolutely, Your Honor. Thank you. I appreciate that.

Soon after, very soon after the liquidations, BlockFi and I are communicating and I say can I take out an unsecured loan to buy back the Bitcoin, and BlockFi says, no, we can't do that, we can only reverse the liquidations if you come up with enough money. This was within days of the liquidation.

Now I have to -- this is an important note. The standard of review, the burden of persuasion, as Your Honor discussed earlier, the underlying burden of persuasion on compliance with the Uniform Commercial Code Article 9 Chapter 6, that burden of persuasion is on BlockFi under California law. And BlockFi has not produced any evidence that the sales actually occurred, has not produced any evidence that the liquidations were commercially reasonable.

For all we know, they accepted the Bitcoin in partial satisfaction of the loan which is void in a commercial transaction -- I'm sorry, I'm sorry, not a commercial transaction -- in a consumer transaction.

THE COURT: Consumer transaction.

MR. GERRO: Yes, that's right.

And why is this important? It's important because I don't have access to that information. BlockFi should have produced it in its objection. It should have produced it in its reply. For all we know, there's no way of knowing that these liquidations actually occurred.

So when I was approached afterwards asking to give more money or Bitcoin to reverse the liquidations, we engaged in negotiations. And during the negotiations, I mentioned that I was interested in reinstating the loan at a price of $7,500 per Bitcoin. The ultimate price of Bitcoin at the time of the acceptance of the offer was $7,700.

And during that time, I informed BlockFi that I was engaged in the due-diligence phase with another lender. And within about a month thereafter, I accepted the offer and obviously one month is a reasonable amount of time to engage in a due-diligence phase with a lender.

BlockFi provided the formula for reinstating the loan. I accepted the offer in accordance with the formula. Soon after that, BlockFi said that they were not going to honor the contract to reinstate the loan. And as a result, that's when the litigation ensued. The price of Bitcoin was not a factor in this other than how it affected the formula for reinstating the loan.

But more importantly, I think that there's something not right about the offer to reverse the loan, and it wasn't a modification of the loan contract. It was a new contract. It was a written modification, and it was signed. It had an email signature which is sufficient in our day and age. An email -- people do not have to transact business through facsimile anymore.

And there was an offer and an acceptance to reinstate the loan, although the amount of the proof of claim is prima facially valid. If this Court is inclined to specifically enforce that contract to reinstate the loan, I think that that's what everybody agreed to at that time. And the Court would be justified in overruling the objection to the proof of

claim. We have not seen enough evidence to negate the prima facie validity and amount of the proof of claim.

I think that it was very clear that there was actual notice of the provisions of the law. There's only one reasonable construction of Financial Code Section 22009. And if there is another reasonable construction, I'd like to hear it because the way that I read the law and I imagine that Your Honor would read the law as well, it cannot be changed unilaterally by any party to this litigation. It was enacted many years ago.

And that's what I'd request is that this Court overrule the objection and enforce the California Financing Law and the California -- this was not only a violation of the statutory definition but a violation of the license which incorporates the statutory definition by reference.

Any questions before I check my notes and I scramble to see if I've missed anything?

THE COURT: No, not at this -- well, let me ask this. With respect to whether or not a modified loan offer was made and accepted, there were no steps afterwards. In other words, did you put up collateral? Did you follow through -- did either side follow through on the obligations that would have been required under reinstating or issuing a new loan?

MR. GERRO: Yes, Your Honor. I tendered the Bitcoin, and a tender is what's required. I did not have a Bitcoin

address to send it to. BlockFi would not provide a Bitcoin address to send it to. That is the state of affairs.

THE COURT: By tender, you mean what specifically did you do?

MR. GERRO: Oh, great question. Can I refer to that email for the Court's reference here?

THE COURT: Yes.

MR. GERRO: Okay. Attachment 16. Bates stamp Page 89. This page, the top email is the one that says, "I'm in the due-diligence phase with the traditional source of capital." That was May 1st, 2020. The next email, BlockFi says, "That's great news. Here's the formula to reinstate your loan. Here's an example. The payment would bring the principal balance" -- that's under his example.

In the next email -- by the way, that email with the formula was from March 24th, 2020. I apologize, I read the date on the top on the header of the page, but that was the date that this was printed. That was not the date of the email. The date with the formula was from March 24th, 2020.

Then April 27th, 2020, I accepted the offer. I provided the formula. I calculated the amount of paydown. And I said, "I will send the Bitcoin today. Please confirm BlockFi's Bitcoin address." That's a tender of performance.

THE COURT: So we're addressing the email of May 24th, and your response of April 27th?

MR. GERRO: Correct, Your Honor.

THE COURT: All right. Thank you.

Let me hear -- Ms. Chavez?

Thank you, Mr. Gerro.

MR. GERRO: Thank you, Your Honor.

MS. CHAVEZ: Thank you, Your Honor.

Mr. Gerro has indicated that his exhibits should be considered shocking, but nothing about this case or the claims or the exhibits should be shocking, Your Honor. Mr. Gerro is not shocked by the terms of the private written loan agreement between the parties or BlockFi's exercise of its rights under that agreement, nor did he appear shocked in the emails by the liquidation notices from BlockFi.

And, again, I would emphasize that this was a private agreement between sophisticated parties. Gerro is not charged with enforcing the laws of California or any other state. And as the evidence clearly indicates for the license itself, everything Mr. Gerro is relying upon were pre-licensing discussions, but the evidence in the Washburn declaration, the Owen declaration, and Judge Strobel's ruling in Gerro-3 clarify that the license was in fact issued to BlockFi on August 20th, 2018.

The Department advised that it agreed with BlockFi's analysis of the California Lending Law, including Section 22009. They made no request for BlockFi to change their

business plans, and they did decline to issue a formal interpretative opinion because they already issued the license and the license was their indication of approval of BlockFi to act as a lender.

In the Gerro-3 ruling, Your Honor, Judge Strobel says that Section 22009 does not explicitly prohibit a finance lender from using or possessing collateral and that the authority charged with issuing lending licenses like the Department may be entitled to deference of their interpretation of the statute. And we think that interpretation is the correct interpretation, Your Honor.

Nothing again shocked Mr. Gerro other than he was just unhappy with the outcome here. And we can understand that, but he signed a written agreement with terms that allowed BlockFi to liquidate the collateral when the loan-to-value ratio was not in compliance. It's clear what happened here that there was no amendment or modification.

Section 22 of the loan agreement expressly states that that was the entire agreement among the parties, and then Section 29 provides that any changes would require a writing signed by the parties. And that was not indicated in the emails. And the debtors have carried their burden, and it's Mr. Gerro's burden to establish that there was some new contract or new loan originated. And he has not done so.

The claim that Mr. Gerro is asserting is of a substantial size which is why the debtors have been proactive in objecting to it to eliminate the continued use of estate resources to defend against a baseless claim. We respectfully request that Your Honor sustain our objection and disallow the claims in their entirety.

If I can answer any questions Your Honor has, I'm happy to do so, but we believe that Your Honor is fully capable of making this decision based off the papers and the arguments today. Thank you.

THE COURT: All right. Thank you, Ms. Chavez.

Mr. Gerro, last comment? You're on mute.

MR. GERRO: Absolutely, Your Honor. Thank you.

I wanted to just quickly address some of Ms. Chavez's points here. I want to say that deference requires two things. It requires compliance with the Administrative Procedure Act, and it requires something to defer to. Here there is nothing to defer to. What this is referred to in California is an underground regulation. An underground regulation is something that's done in secret, and it actually void. It's not entitled to any deference.

Regarding the size of the claim, this claim simply just represents my Bitcoin. The size of the claim is much more massive for me than it is for BlockFi. And I didn't ask for any damages. I'm asking for a return of the Bitcoin. I'm

asking for a return of the Bitcoin on the same treatment that any other debtor in my situation would be entitled to.

And, lastly, regarding Gerro-3, that tentative ruling expressly states that it is not a final determination. The tentative ruling is expressly tentative. And although it was adopted by the court, it is not preclusive. I respectfully submit that this Court should do its own independent statutory construction of 22009 and Your Honor will hopefully arrive at the same conclusion. Thank you, Your Honor.

THE COURT: Thank you.

So just so we're all working under the same assumption, if I were to allow the claim for roughly -- it has a value roughly of 12 million I guess base, 400 Bitcoin, right?

MR. GERRO: May I make a comment, Your Honor?

THE COURT: Yes.

MR. GERRO: The dollar value of the Bitcoin on the day of the petition was about 6.9 million. And the reason why I'm asking for an in-kind amount is because just because I want to qualify for an in-kind distribution just like everyone else.

THE COURT: So on the day of the petition, Bitcoin was trading at about $16,000. And so you're seeking 400 coins, roughly, at that amount?

MR. GERRO: Yes, Your Honor. And I will add that if Your Honor is inclined to specifically perform the contract for redemption, I will concede that this Court may subtract the

principal amount of the loan and the interest accrued thereon which would be about $2-1/2 million.

THE COURT: And let me turn to debtors' counsel. Under the proposed plan, how are other BlockFi loan obligors being treated?

MS. CHAVEZ: Well, first and foremost, Your Honor, I just would like to emphasize that Mr. Gerro instructed BlockFi to liquidate the remaining collateral and pay off his loan. So to give him the new type of claim would be a double recovery because he does not any longer owe a debt to BlockFi and he withdrew his remaining Bitcoin from the platform.

But if he were to have an allowed claim, he would be treated as a general unsecured creditor under BlockFi Lending, which provides for a cash distribution, not an in-kind distribution.

THE COURT: Right. and I believe according to the disclosure statement, the anticipated return is in the range of 30 percent or so --

MS. CHAVEZ: Yes --

THE COURT: -- depending upon future litigation?

MS. CHAVEZ: Certainly.

THE COURT: All right. Okay. Thank you.

I will given the upcoming confirmation hearings in September and the voting deadlines, I will issue a ruling, at worse, a preliminary ruling at some point next week on both the

motion and the cross-motion. I might supplement it with a more extensive ruling.

I will, as I do with all parties, urge the parties to take that time before I rule because when I rule, there will be a winner and a loser, take the time to see if it makes sense, especially in light of the questions I asked at the end whether it makes sense to resolve this matter without the Court issuing a ruling.

I'll leave that for you all to consider. I thank you all for your argument. And, Mr. Gerro, did you have another question?

MR. GERRO: Yes, Your Honor.

Regarding the informal resolution, I would like to say that I've asked BlockFi to mediate the issue. They do not want to mediate. And, therefore, I would ask the Court to order this to a mandatory settlement conference so we could have meaningful settlement discussions.

THE COURT: Well, every dollar that I direct BlockFi to expend is coming out of everyone's pockets, all the other creditors. I am leery of doing that at this juncture. You can certainly start with phone calls on your own. You don't need a neutral. You're all professionals, and I think you can by my questions anticipate the direction or, if not, take into account what the dollar are at stake and try to reach a resolution.

If you need more time, you'll reach out for the Court but I'm not going to direct a mediation at this point.

Thank you all. Court is adjourned.

MR. GERRO: Thank you very much, Your Honor.

THE COURT: You're welcome. Thank you.

(Proceedings adjourned at 12:16 p.m.)

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C E R T I F I C A T I O N

I, DIPTI PATEL, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter and to the best of my ability.

/s/ Dipti Patel

DIPTI PATEL, CET-997

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